

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEREK A. CLIFTON,	:
Plaintiff,	:
v.	: Case No. 3:12-cv-171-KRG-KAP
CORRECTIONS OFFICER MICHAEL	:
FREEMAN, <u>et al.</u> ,	:
Defendants	:

Report and Recommendation

Order and Recommendation

After the dismissal of his complaint, plaintiff filed a motion for reconsideration, docket no. 5, referred to me pursuant to 28 U.S.C. § 636(b)(3). The motion for reconsideration should be denied.

Report

Plaintiff, now an inmate at S.C.I. Dallas, filed a complaint against four employees of the Pennsylvania Department of Corrections at S.C.I. Houtzdale. After screening the complaint under 28 U.S.C. § 1915A, I recommend that the complaint be dismissed for failure to state a claim, with leave to amend. docket no. 2. Plaintiff did not timely object or amend, and the Court dismissed his complaint, docket no. 4.

Plaintiff filed a timely motion to reconsider under Fed.R.Civ.P. 59, asserting that he had never received the Report and Recommendation. docket no. 5.

If plaintiff never received the Report and Recommendation he should certainly be given a chance to amend his complaint. If plaintiff is falsely claiming he never received the Report and

Recommendation, he is trying to obtain an unwarranted extension of time.

It would be a poor use of judicial resources to hold a hearing to determine the truth of plaintiff's claim when the simpler solution is to deny this motion but allow plaintiff to start over again by filing a new complaint. The dismissal of the complaint with leave to amend was effectively a dismissal for lack of prosecution, not a judgment on the merits, so there is no *res judicata* effect, dismissal did not count as a strike under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g), only one fee will be collected under the Prison Litigation Reform Act (PLRA), and the complaint would relate back to the filing date of the original complaint for statute of limitations purposes under Fed.R.Civ.P. 15.

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have fourteen days to serve and file written objections to this Report and Recommendation.

DATE: November 7, 2012

Keith A. Pesto
Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

Derek Clifton HP-2615 (w/ copy of docket no. 2)
S.C.I. Dallas
1000 Follies Road
Dallas, PA 18612